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| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | SECOND JUDICIAL CIRCUIT |
| COUNTY OF BARNWELL ) | |
| ) | Civil Action 2015-CP-06-076 |
| QUICKEN LOANS, INC., ) | |
| Plaintiff, ) | |
| ) | |
| vs. ) | ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT |
| ) | |
| EZEKIEL T. WILSON ) | |
| a/k/a EZEKIEL (ELLEN) T. WILSON, ) | |
| et al., ) | |
| Defendants. ) | |

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RHODA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

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SC Court of Appeals

This is an action to foreclose a mortgage of real estate. The parties have filed competing motions for summary judgement. Defendant moves for partial summary judgment for violation of South Carolina's Attorney Preference Statute found at SC Code Ann. §37-10-102. Defendant contends that the manner by which Quicken utilized the attorney preference form in the subject transaction is in and of itself unconscionable under SC Code Ann. §37-10-105(c). In its competing motion for summary judgment, Plaintiff denies that Defendant is entitled to relief under the cited statutes. Plaintiff also asserts that, even if the statutes were applicable, no attorney preference violation occurred nor was Quicken's use of the form unconscionable. I deny Plaintiff's motion and grant Defendant's motion.

Plaintiff presented and argued two other motions. My findings on both are discussed below. Plaintiff's motion to transfer to the jury roster is denied. Plaintiff's motion to amend complaint is granted in part and denied in part.

## SUMMARY JUDGMENT CROSS-MOTIONS

### BACKGROUND

On December 14, 2011, Defendant Mrs. Ezekiel Wilson (hereafter referred to as "Wilson") entered into a mortgage transaction with Plaintiff Quicken Loans Inc. (hereafter referred to

as "Quicken") secured by her residence. On November 7, 2011, Wilson signed a form entitled "attorney/insurance preference check list." The form appears to be identical to the attorney preference form promulgated by the Department of Consumer Affairs, except that it is pre-populated with responses. For reference, a copy of the form is attached hereto as Exhibit A.

Under Part 1, the form correctly states: "I (We) have been informed by the lender that I (We) have a right to select legal counsel to represent me (us) in all matters related to the closing of the loan." However, under Part 1(a), the form was pre-populated to read: "I/ We will not use the services of legal counsel." Under Part 1 (b) - which allows the consumer to select an attorney from a list of acceptable attorneys if they have no preference as to a particular attorney - the form is pre- populated to read: "Not applicable". In contrast, under Part 2 of the form - advising the borrower of their right to select their insurance agent – the Quicken representative taking the loan application was able to populate the form with the Wilson's selected insurance company, State Farm.

Defendant offered the testimony of Jeffery Campbell, Jennifer Randall and Brian Hughes, who were witnesses in *Boone v. Quicken Loans, Appellate Case No. 2013-002288.* Their testimony consisted of 30(b)(6) deposition testimony which was read into the record as well as live testimony.[1]

According to Mr. Campbell, at the time of application Quicken's operating system prompts Quicken's banker to ask the borrower the following question: "Will the borrower select legal counsel to represent them in this transaction?" If the borrower responds "no", the attorney preference form is pre-populated to read: "I/We will not use the services of legal counsel." Con-

[1]. Defendants identified Jeffrey Campbell as senior corporate counsel at Quicken Loans, Jennifer Randall as divisional vice president at Quicken Loans, and Brian Hughes as Chief Operating Officer at Title Source.

versely, if the borrower responds "yes", Quicken does not follow up with any inquiry to ascertain who the preferred attorney is. Instead, Quicken's system automatically populates the form to read: "Please contact lender with preference". The form is then forwarded to the borrower for his/her signature.

Quicken's operating system only allows the attorney portion of the preference form to be pre-populated with one of those two Quicken-selected phrases. At no time is the borrower allowed to indicate her choice for an attorney on the form or to the Quicken representative taking the application.

In instances where the form is pre-populated with "I/we will not use the services of legal counsel," the loan is forwarded to Quicken's affiliate company, Title Source, Inc., which acts as the settlement agent in the transaction. Quicken contracts with Title Source to provide "settlement services" in South Carolina. Settlement services include, among other things, title search, title abstract and exam, document preparation, attorney signings, recording and disbursement. In furtherance of its agreement with Quicken, Title Source subcontracts with and supervises attorneys to perform the settlement services, including those that South Carolina requires to be performed by a South Carolina attorney.

Wilson's HUD-1 Settlement Statement reflects a closing on December 14, 2011 and lists Title Source as Settlement Agent and Williston, SC as the Place of Settlement. The HUD-1 Settlement Statement further shows that Wilson paid Title Source $525.00 as a "Settlement or closing fee" (line 1102) and $150.00 for an "Abstract or Title Search" (line 1109). No attorney is referenced on the settlement statement.

According to his affidavit, Carlton Robinson, an attorney, appeared at the closing. Mr. Robinson indicates he inquired of Wilson's attorney preference at the time of closing. Simulta-

neous with the closing (December 14, 2011), a loan application was also signed indicating Mr. Robinson as Wilson's preferred attorney to close the loan.

**STANDARD FOR SUMMARY JUDGMENT**

Summary judgment is appropriate where there is no genuine issue of fact and it is clear that the moving party is entitled to judgment as a matter of law. Rule 56(c) SCRCP. The purpose of summary judgment is to expedite disposition of cases that do not require the services of a fact finder. *Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E. 2d. 433, 438 (2003).* In determining whether any triable issues of fact exist, the Court must view the evidence and all inferences which can be drawn from the evidence in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).* Where cross motions for summary judgment have been filed, the parties concede that the issues before the court should be decided as matter of law. *Wiegand v. United States Automobile Association, 391 S.C. 159, 164, 705 S.E.2d 432, 434 (2011)*

**THE ATTORNEY PREFERENCE STATUTE**

SC Code §37-10-102, commonly referred to as the "attorney preference statute," provides in pertinent part:

> "Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose:
>
> (a) The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction..."

The purpose of §37-10-102(a) is to protect consumers. *Camp v. Springs Mortgage Corporation*, 310 S.C. 514, 436 S.E. 2d 304 (1993). The provisions of §37-10-102 are to be liberally construed to achieve this purpose. *Tilley v. Pacesetter, 333 S.C. 33, 508 S.E. 2d 16 (1998)(Tilley*

*I)* citing §37-10-102 (1976). Moreover, rights and benefits provided by §37-10-102(a) cannot be waived by the consumer. SC Code Ann. §37-1-107 (1976).

Section 37-10-102 gives two options to "ascertain the preference." The statute provides:

> The creditor may comply with the section by:
>
> (1) including the preference information on or with the credit application so that this information is shall be provided on a form substantially similar to a form distributed by the administrator; or
>
> (2) providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared. If a creditor uses a preference notice form substantially similar to a form distributed by the administrator, the form is in compliance with this section.
>
> SC Code §37-10-102(a)

The form distributed by the administrator is set forth in an Administrative Interpretation issued the Department of Consumer Affairs in 1983, shortly after the enactment of SC Code §37-10-102. Administrative Interpretation No. 10.102(a)-8302 (the "AI"). This form – when properly used – provides a "safe harbor" for the lender endeavoring to comply with the attorney preference statute. SC Code §37-10-102(a) *supra; see also* §37-6-104(4).

In the A.I., the Administrator, after first noting "the provisions of § 37-1-102 and the Consumer Protection Code as a whole," found that:

> "...in enacting §37-10-102(a), the General Assembly had two main objectives: (1) to provide the borrower with the right to legal counsel of his choosing...; and (2) to make these rights known to the borrower (applicant) by a conspicuous disclosure and have the borrower make his preference known before he is inundated with other documents related to the transaction."

The Administrator further stated:

> "...by having the borrower affirmatively select an attorney or insurance agent, it becomes less likely that the borrower will ultimately acquiesce to the *lender's* choice of an attorney or insurance agent for whom the borrower would have to pay, even though that attorney or agent might actually represent the interests of the lender..."

Administrator Interpretation 10.102(a)-8302 (italics in original)

The A.I. has been specifically addressed and cited with approval at least twice by the South Carolina Supreme Court. *Davis v NationsCredit Finance, Inc., 326 S.C. 83, 484 S.E. 2d 471 (1997), King v American General, 386 S.C. 82, 687 S.E. 2d 321 (2009).* Further, the General Assembly implicitly adopted the A.I. when it amended §37-10-102(a) to specifically allow lenders to comply with §37-10-102(a) by using the preference form supplied by the Administrator. *1996 Act No. 355, §1.*

Nothing in the 1996 amendment alters the Administrator's findings as to the purpose of the statute. It merely gives the lender more flexibility to comply with the statute in terms of timing. As noted by Kathleen Goodpasture Smith in her South Carolina Consumer Protection Code, 4th ed. SC Bar (2001):

> In 1996, this subsection [37-10-102(a)] was modified to remove the requirement that the attorney preference information be on the first page of the application and replace it with a more flexible requirement that the preference information be (1) on or with the credit application or (2) mailed or delivered within three business days of receiving the application. Allowing three business days after application conforms to federal disclosure laws such as the Truth in Lending Act and Real Estate Settlement Procedures Act as well as recognizing realities of the marketplace with telephone and other non-traditional applications.
> Comment 2, Page 402.

**DISCUSSION**

Both parties rely on the November 7, 2011 preference form attached to this Order. Neither party disputes that this form was signed by Wilson on November 7, 2011. Wilson does argue that this form was not timely signed. The issue is whether the Quicken pre-populated form properly ascertains Wilson's preference as to the attorney to represent her in all matters related to this transaction pursuant to §37-10-102.

Quicken argues that the preference form complies with §37-10-102(a) and disclosed to Wilson her right to select legal counsel to represent her in all matters related to the transaction.

In fact, the form - without the blanks filled in - is identical to the preference form promulgated by the Administrator. Wilson argues that pre-populating the form by Quicken renders any disclosure made by Quicken meaningless. Further, §37-10-102 requires more than disclosure: the statute requires the lender to actually ascertain the preference of the borrower as to the attorney to represent them in all aspects of the transaction. The lender must do more than disclose to the borrower; the lender must elicit certain specific information from the borrower.

**The Pre-Populated Form**

Determining whether the pre-populated form complies with §37-10-102 is a question of law for this court. *Wiegand, supra.* The printed form is identical to the form promulgated by the Administrator. However, when Quicken pre-populates the form, it takes away the borrower's choice, the borrower's right to make a selection on the form - the very purpose for which the form was designed and the statute exists. This occurs even if Quicken is told by the borrower that she will select an attorney to close the loan, since Quicken does not follow up and ask the identity of the preferred attorney.

When the lender completes the form with "I/We will not use the services of legal counsel," that action operates as an attempt to obtain a waiver of rights that are expressly cannot be waived under the South Carolina Consumer Protection Code. This is expressly prohibited under S.C. Code Ann. § 37-1-107 (1976). Moreover, when the lender completes the form with "I/We will not use the services of legal counsel," the lender is also suggesting that the loan may be closed without an attorney. Such a suggestion runs afoul of the *Buyers Services* decision of the South Carolina Supreme Court. 292 S.C. 426, 357 S.E.2d 15 (1987). South Carolina law requires that a lawyer must close the loan, and South Carolina law does not allow a borrower to waive that requirement.

After the pre-populated form is signed, the loan is then assigned to Quicken's affiliate, Title Source. Title Source, an out- of-state corporation, is not a law firm. Title Source is listed as the settlement agent on Wilson's HUD-1 and is paid the settlement or closing fee as well an abstracting fee.

If the borrower truly has no preference as to a particular individual attorney to close the loan, the Administrator's preference form affirmatively requires the borrower under Part 1(b) to select an attorney from a list of attorneys acceptable to the lender. Quicken chose to use this form but provided no list of acceptable attorneys so that the borrower could make an informed choice. Instead Quicken chose to pre-populate this portion of the form with "Not Applicable". Neither the language of the pre-1996 version or current version of §37-10-102 referenced "a list of acceptable attorneys" if the borrower had no preference. However, the Legislature implicitly adopted the Administrator's 1983 findings when it set forth the methods lenders could comply with the preference requirement in §37-10-102(a). The Administrator reasoned that affirmatively requiring the borrower to make a choice would ensure the independence of the attorney selected to close the loan. Quicken thwarted the purpose of this section of the form by not providing a list of acceptable attorneys and by pre-populating the form.

I therefore conclude as a matter of law that Quicken, in pre-populating the form, eviscerates the very purpose of §37-10-102 and renders it meaningless. Thus, Quicken fails to ascertain the borrower's attorney preference under the statute. Quicken's action also constitutes an attempt to elicit a waiver, which is expressly not permissible under the code

**Ascertaining the Attorney Preference at Closing**

Quicken also asserts that: (1) it gave the preference orally to Wilson on the date of closing; and (2) Wilson signed an application on the date of closing designating Carleton Robinson

as her attorney of choice. These arguments fail for several reasons. First, it is the responsibility of the lender, not of the closing attorney, to ascertain the attorney preference. See Sneed v. Homebridge Mortgage Bankers Corp. 2010 WL 4053605 (USDC SC 2010). Second, the suggestion that the attorney hired by Title Source to appear at closing can also ascertain the attorney preference at the closing, calls into question the independence of the attorney. *In re Breckenridge, __S.C.__, __S.E.2d__, 2016 WL 1583998 (2016).* Third and most importantly, our Supreme Court has already held the suggestion that the attorney preference can be ascertained at the closing table "borders on frivolity." *King v. American General Finance, Inc., 386 S.C. 82-91, 687 S.E. 321-325 (2009).*

Quicken argues that King is inapplicable, since it concerns the pre-1996 version of §37-10-102. The pre-1996 version required the lender to ascertain the preference of the borrower at the time of application. The 1996 amended version of §37-10-102(a) requires the preference to be ascertained prior to closing. However, the 1996 amended version clarifies precisely when prior to closing. The lender is given the option of: "(1) including the preference form information on or with the application...; or 2) providing written notice to the borrower of the preference with the notice being mailed no later than three business days after the application is received...."

In discussing the post-1996 version of §37-10-102, the Court in King stated in footnote 1 of the opinion:

> Effective May 30, 1996, the Legislature amended Section37-10-102(a)... . Following this amendment, a lender was required to notify the borrower prior to closing of the borrower's attorney preference rights by either: (1) including the information on or with the credit application, or (2) providing the borrower written notice of the preference information that is delivered or mailed no later than three business days after the application is received or prepared. (citations omitted)

In footnote 3 of the opinion the Court re-iterates that the lender can comply with the requirements of §37-10-102(a) by one of the above-listed methods. Therefore, *King*, at the very least, interprets §37-10-102(a) to require the lender to mail the attorney preference notice in a form substantially similar to the form distributed by the Administrator no later than three business days after receiving the competed application with no pre-populated entries by Quicken.

Even if *King* did not reach this conclusion, I would find that interpreting the present version of §37-10-102(a) to allow the attorney preference to be ascertained at closing leads to an absurd result. The statute requires a lender to comply "prior to closing." The statute requires the lender to ascertain the preference of the attorney to represent the borrower in all matters related to the transaction. This necessarily includes the title search and preparation of documents or direct supervision of the same. These tasks cannot be performed at the closing table. For the statute to have any meaning, the preference must be ascertained in sufficient time for the attorney selected by the borrower to perform these tasks. Requiring the lender to ascertain the borrower's preference by mailing the borrower a form substantially similar to the form distributed by the Administrator within three days of the application, accomplishes this result.

**Statute of limitations**

Next, Quicken asserts that the three year statute of limitation for bringing an attorney preference action has expired. Section 37-10-105 provides:

> No debtor may bring a cause of action for violation of this chapter more than three years after the violation occurred, **except as set forth in subsection (c).....This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the occurrence of the violation as a matter of defense by recoupment or set-off in such action.** (emphasis added)

Since the attorney preference claim in this case is asserted as a defense/counterclaim, the three-year statute of limitations is inapplicable. Further, the literal reading of the statute provides

the statute of limitations for violating §37-10-102 to be three years, **"except as set forth in subsection (c)."** Subsection c relates to unconscionability. Therefore, the three-year statute of limitations would not apply to situations where unconscionability is found.

**Timeliness of Motion**

Finally, Quicken argues that Wilson's motion should not be heard until the final hearing, since it involves a defense of setoff. This argument ignores the practical problem that a violation of the preference statute must first be determined before the issue of unconscionability can be reached. Further, Wilson does not seek a determination of the amount of penalty or actual damages at this juncture. This argument is without merit.

**UNCONSCIONABILITY**

SC Code Ann. §37-10-105(c) provides:

> If the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made or was induced by unconscionable conduct, the court may, in an action other than a class action:
>
> (1) refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made;
> (2) enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result;
> (3) rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement; or
> (4) award:
>  (a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge;
>  (b) not more than double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party; and
>  (c) attorney's fees and costs.

**Applicability of §37-10-105(c) to §37-10-102 Violations**

Quicken argues that §37-10-105(c) does not apply to attorney preference violations. (Quicken does not assert that §37-10-105(a) does not apply.) In *Tilley I*, the Supreme Court found that the remedies contained in §37-10-105 to be available for attorney preference violations. Under the old version of §37-10-105, the remedy provided was the old usury remedy. §37-10-105 was amended in 1997 to reduce the statutory penalty from the old usury penalty to a range of $1,500 to $7,500 per debtor. However, the old usury penalty is still available in cases where the Court finds unconscionable conduct under §37-10-105(c). Kathleen Goodpasture Smith, *The South Carolina Consumer Protection Code,* 4th ed. SC Bar 2001, comment 2, page 409. Provisions of the Consumer Protection Code are to be liberally construed to achieve its purposes and the purpose of the attorney preference statute is to protect consumers. There is nothing in the amended statute that suggests subsection (c) does not apply to attorney preference causes of action. Had the legislature, in amending the statute, intended §37-10-105(c) not to apply to attorney preference actions, it would have said so. *Tilley I at 333 S.C. 40, 508 S.E. 2d 20 (1998).*

I find all of the remedies in §37-10-105, including subsection (c) apply clearly and unambiguously to attorney preference violations. There is further support for this conclusion. To the extent that §37-10-105(c) could contain any ambiguity as to whether it is applicable to an attorney preference violation, the court may consider a statute's title in aid of construction. *Brooks v. Northwood Little League, Inc., 327 S.C. 400, 489 S.E. 2d 647, 650 (Ct. App. 1997) citing Morton Builders, Inc. v. von Beuding en., 316 S.C. 388, 402, 450 S.E. 2d. 87, 95 (Ct. Appl 1994).*

When §37-10-105 was amended by the Legislature in 1997 Act 99, the title provided the following:

AN ACT TO AMEND SECTION 37-10-105... RELATING TO PENALTIES FOR THE VIOLATION OF THE ATTORNEY'S (sic) PREFERENCE LOAN PROVISION UNDER THE CONSUMER PROTECTION CODE....
Be it enacted by the General Assembly of the State of South Carolina:
**Provides for certain actions against lenders violation attorney's (sic) preference option**

**(the body of the statute follows)**

The title does not differentiate in relief available under §37-10-105 that it is available for attorney preference violation. This includes §37-10-105(c).[2]

I conclude that §37-10-105(c) is applicable to attorney preference violations.

**Unconscionability under the Consumer Protection Code**

Section 37-5-108(4)(a)(iv) provides:

> in "determining whether an agreement or transaction is unconscionable at the time it is made or induced by unconscionable conduct, ...**consideration must be given to applicable factors, such as, but without limitation**.... the fact that the...**lender knowingly has taken advantage of the inability of the ... debtor to reasonably to protect his interests** by reason of physical or mental infirmities, ignorance, inability to understand the language of the agreement or such other factors." (emphasis added)

"Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them."

*Fanning v. Fritz Pontiac-Cadillac-Buick, Inc. 322S.C.399, 403, 472 S.E.2d 242, 245 (1996).*

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[2] Moreover, in *Greentree Financial Corporation v. Fleming, 95-CP-40-4282, (order filed February 10, 2002),* Circuit Judge Clifton Newman found the provisions of §37-10-105(C) applicable to attorney preference violations. Judge Newman found that Greentree's knowing failure to provide the attorney preference form to be unconscionable. Citing 37-5-108(4)(a)(iv) and *Buyers Service 292 S.C. 426, 357 S.E. 2d. 15 (1987)* the Court found Greentree's failure to provide the form took advantage of the borrower's ability to protect his/her interest in the transaction and amended relief under §37-10-105(c).

While the preference form is not a contract, it is a legally required part of the lending transaction, without which the mortgage transaction should not occur.

Essentially, the definition of unconscionability under the Consumer Protection Code is the same as its definition under principles of contract law. Therefore, the question is whether there was an absence of choice and oppressive and one-sided terms in Quicken's use of the pre-populated form. In making this determination, the Court should consider all applicable factors including, but not limited to, those factors set forth in §37-5-108(4)(a).

**Absence of Meaningful Choice**

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process. *Simpson v. MSA of Myrtle Beach, Inc., 373S.C. 14, 25, 644 S.E.2d 663, 669 (2007).* Clearly, Quicken is in a superior bargaining position and possesses greater knowledge and understanding of the mortgage loan process. Moreover, Wilson would not have been a substantial business concern to Quicken. Quicken's pre-populating the form can also be compared to a contract of adhesion, since it gives the borrower no option to actually choose an attorney.

In contrast, the form promulgated by the Administrator conspicuously and clearly advises the borrower in writing of his/her right to select the attorney to close the loan. It is designed to allow the borrower to affirmatively fill in the name of the attorney so that there is no doubt as to who made the selection. When the form is pre-populated, the right to choose is taken away and waived. The borrower has no choice as to the attorney to close the loan.

At no time does the borrower have the ability to make his preference known on the form. Quicken's argument that it ascertained the preference at closing (after it has knowingly pre-

populated the form to preclude the borrower from selecting an attorney) highlights the lack of meaningful choice.

**Oppressive and One-Sided Terms**

In determining whether an arbitration clause was oppressive and one-sided, the Supreme Court in *Simpson* considered whether the clause violated public policy, statutory law or provisions of the Constitution. id, at *373 S.C. 29, 644 S.E.2d 671, internal citation omitted.* The pre-populated Quicken preference form violates the statutory law and public policy of this state in three respects: (1) It operates as a waiver of rights under the Consumer Protection Code in violation of §37-1-107; (2) It allows Quicken to refer the closing to its affiliate, Title Source, a non-lawyer corporation in violation of §40-5-320; and (3) It provides an option of not using "legal services" to a close a loan and encourages the unauthorized practice of law in violation of *State v. Buyer's Service, 292 S.C. 426, 357 S.E.2d 15 (1987).*

**Waiver**

SC Code Ann. §37-1-107 provides "a... debtor may not waive or agree to forego rights or benefits under this title." This includes the right to select the attorney to represent them relating to a mortgage loan closing.

In this case, the pre-populated form operates as a waiver of the borrower's statutory right to select the attorney of his/her choice to represent them in all matters related to the mortgage transaction. Section 37-1-107 must be interpreted liberally to achieve the purpose of the Code – protecting consumers. Quicken, by having the borrower sign a preference form that states "I/We will not use the services of legal counsel" causes them to agree not to select an attorney to represent them in the transaction. I deem the result is a waiver by the borrower to forego rights afforded under the Code. I conclude it violates §37-1-107.

**§40-5-320**

Section 40-5-320 provides:

> It is unlawful for a corporation or voluntary association to:
> ...
> (3) hold itself out to the public as being entitled to practice law, render or furnish legal services, advise or **to furnish attorneys** or counsel, or render legal services in actions or proceedings; (emphasis added)

The phrase "I/We will not use the services of legal counsel" together with the settlement statement listing Title Source as the settlement agent is troubling. It suggests the closing process can occur without attorney supervision. Quicken contracted with Title Source to perform "settlement services" – a term that includes certain functions that are required to be performed by an attorney in South Carolina. The agreement requires Title Source to furnish and supervise attorneys needed for the closing process. The HUD-1 reflects closing fees and title abstract fees to be paid to Title Source, an out-of-state corporation and a non-lawyer. Section 40-5-320 prohibits corporations from engaging in the unauthorized practice of law and from furnishing attorneys to practice law.

The question of whether Quicken or Title source engaged in the unauthorized practice of law (UPL) rests exclusively with the Supreme Court, and I make no finding of UPL. Regardless of whether either company engaged in UPL, they cannot furnish attorneys without violating §40-5-320. Quicken in pre-populating the form and directing closings to Title Source, its affiliate, knowingly participates in this violation and causes the borrower, albeit unwittingly, to participate in the violation.

***Buyer's Service***

Buyer's Service was a non-lawyer title company which performed real estate closings in South Carolina. Though the company hired attorneys to perform certain tasks in the closing pro-

cess, the Court found this did not save the company from UPL. The Court also noted the practice violated §40-5-320. Title Source is a non-lawyer title company attempting to do exactly the same thing Buyer's Service, in part, was prohibited from doing almost 30 years ago. The pre-populated preference form violates the long-standing policy of *Buyer's Service* in that it contemplates and encourages the unauthorized practice of law. It further violates the public policy of this state set forth under *Buyer's Service* since closing a loan without direct attorney supervision is not a lawful option.

For these reasons, the pre-populated form violates the statutory law and public policies of this state designed for the protection of the consumer and is oppressive and one-sided. Quicken's conduct violates §37-5-108(4)(a) in that it knowingly takes advantage of the borrower's inability to protect his interest.

**Survival of Unconscionability Claims at the Death of the Borrower**

Quicken also asserts that a cause of action for unconscionability under §37-10-105(c) does not survive the death of Mrs. Wilson[3]. It compares a cause of action for unconscionability to an action for fraud and deceit which does not survive the death of the claimant. In *Tilley v. Pacesetter, 355 S.C. 361, 585 S.E. 2d. 292 (2003) (Tilley II)* the lender argued an attorney preference action under §37-10-105 did not survive the death of the borrower because the violation involved fraud and deceit. The Supreme Court found that the cause of action for an attorney preference violation survived the borrower's death, since it did not involve fraud. *Tilley id 355 S.C. 378.*

[3] This action on behalf of Defendant is being maintained by Wayne D. Wilson as Personal Representative of the Estate of Ezekiel Wilson.

Just as the attorney preference violation is not based upon fraud, an action for unconscionability under §37-10-105(c) is not based upon fraud. As stated above, unconscionability involves an absence of meaningful choice together with oppressive and one-sided terms. It does not require the elements of fraud to be proven. I conclude it survives the borrower's death.

**The application of §37-5-108(3)**

Finally, Quicken argues that §37-5-108(3) requires this court to hold an evidentiary hearing prior to making a determination of unconscionability under the statute. I find this provision does not preclude either party from filing a motion for summary judgment, especially since both parties have filed cross-motions for summary judgment. However, I do find an evidentiary hearing is needed to determine the appropriate relief under §37-10-105.

**MOTION TO TRANSFER (JURY TRIAL)**

After Wilson filed its Partial Summary Judgment Motion, Quicken moved to transfer this case to the general docket for a jury trial on issues presented in Wilson's counterclaim. The only pending counterclaims at that time were Wilson's cause of action for attorney preference violations under §37-10-105(a) and §37-10-105(c). Since summary judgment has been granted herein on Wilson's counterclaims, I find the request to be moot. Moreover, both parties filed cross-motions for summary judgment, thereby conceding the issues before the court should be decided as a matter of law. *Weigand, supra*.

Even if summary judgment had not been granted, I would find that Quicken waived its rights to a jury trial in this matter. Quicken filed its foreclosure complaint on March 3, 2015. In its initial complaint, Quicken asserted its right to a deficiency judgment. The Wilson Estate answered on May 21. On May 29, 2015, Quicken filed an amended complaint naming the Estate, as well as the heirs of the estate, and waiving deficiency judgment. On June 19, 2015, Wilson

filed an amended answer to the amended complaint and asserted its counter-claims. Quicken filed its reply on August 20, 2015 and did not demand a jury trial.

On September 1, 2015, Quicken filed a motion requesting that the undersigned be appointed as Special Referee in this case. Quicken also prepared an order for the court to appoint the undersigned. The order was signed the same day. The order specifically grants the Special Referee the authority to hear and determine all matters, and to retain jurisdiction to carry out any final order as well as to hear any action contesting the validity of the action or motions contesting the action's validity.

On October 22, 2015, Wilson filed a second amended complaint. Quicken filed its second reply on November 10, 2015. Again, Quicken did not demand a jury trial. Only after Wilson filed her summary judgment motion on January 19, 2016 did Quicken file its jury trial demand (January 25, 2016), six days after Wilson filed her summary judgment motion. SCRCP 38(d) provides:

> The failure of a party to serve a demand as required by this rule and to file it as required by this Rule 5(d) constitutes a waiver by him of trial by jury.
> .....

SCRCP 39(b) provides:

> (b) Issues of law and issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court or may be referred to a master as provided in Rule 53; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues.

A party consenting to a reference to a master in equity or special referee waives his right to a jury trial. *Richland County v. Lowman, 307 S.C. 422, 415 S.E. 2d 433 (1992).* Quicken in this case did more than consent to the reference, it actually filed a motion requesting the reference and prepared the Order to grant the special referee his authority. I find Quicken has

waived its right to a jury trial. Moreover, even if Quicken had not waived its right to a jury trial, I would decline to exercise a discretionary grant of its motion for a jury trial, since (1) the request comes almost one year after the filing of the complaint and long after Quicken was made aware of the counterclaims in this action and (2) since Quicken was aware of the counterclaims prior to seeking referral of this action.

**MOTION TO AMEND PLEADINGS**

Quicken has also moved to amend its pleadings to assert four new causes of action. Ezekiel Wilson died November 17, 2014. Her estate was filed April 15, 2015. Notice to Creditors was first published on May 13, 2015. No claim has been filed against the estate by Quicken with the Barnwell County Probate Court. In fact, upon discovering Mrs. Wilson's death, Quicken amended its Complaint to waive deficiency judgment. Quicken filed its Motion to Amend on March 11, 2016.

S.C. Code Ann. 62-3-803(1976) provides:

> (a) All claims against a decedent's estate which arose before the death of the decedent, including any claims of the State and any political subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or nonclaim statute; are barred against the estate, the personal representative, the decedent's heirs and devisees, and nonprobate transferees of the decedent; unless presented within the earlier of the following:
>
> (1) one year after the decedent's death; or
>
> (2) the time provided by Section 62-3-801(b) for creditors who are given actual notice, and within the time provided in Section 62-3-801(a) for all creditors barred by publication.
>
> * * *
>
> (d) Nothing in this section shall be construed as placing a limitation on the time for:
>
> (1) commencing a proceeding to enforce a mortgage, pledge, lien, or other security interest upon property of the estate;

Section 62-3-803 is a nonclaim statute. "A nonclaim statute is a self contained statute which absolutely prohibits the initiation of litigation based on it after a prescribed period." *In Re Hover*, 407 S.C. 194, 206, 754 S.E.2d 875, 881(2014).

Ezekiel Wilson died more than one year ago, and Quicken did not file a claim with the Probate Court. Quicken's second and fifth proposed amended causes of action are for breach of contract. Because these causes of action are barred by § 62-3-803, I deny Quicken's Motion to Amend with respect to these causes of action.

Quicken's third and fourth proposed amended causes of action are related to enforcement of a security interest. Quicken's Motion to Amend is therefore granted to the extent these causes of action seek to enforce a security interest in property mortgaged to Quicken. However, under *Hover*, Quicken may not seek a deficiency under these causes of action.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. Defendant's Motion for Partial Summary Judgment is **Granted;**
2. Plaintiff's Motion for Summary Judgment as to Defendant's counterclaims is **Denied;**
3. Plaintiff's Motion to Transfer to General Docket for a Jury Trial is **Denied;**
4. Plaintiff's Motion to Amend is **Granted in part and Denied in part;**
5. This Court shall retain jurisdiction to hear all matters, per the Order of Reference;
6. The parties shall confer within ten days an advise when they are available for a final hearing.

AND IT IS SO ORDERED!

May 13, 2016

Barnwell, South Carolina

J. Martin Harvey
Special Referee

# EXHIBIT A

3304634992

# ATTORNEY/INSURANCE PREFERENCE CHECK LIST

| Borrower Name(s): | Lender: |
|---|---|
| Calvin O. Wilson, Jr.<br>Ezekiel T. Wilson | Quicken Loans Inc.<br>Company NMLS#: 3030 |
| **Property Address:** | **Date:** |
| 12640 Main St<br>Williston, SC 29853 | November 4, 2011 |

1. I (We) have been informed by the lender that I (we) have a right to select legal counsel to represent me(us) in all matters of this transaction relating to the closing of the loan.

   (a) I select I/We will not use the services of legal counsel.

C O Wilson Jr 11-7-11 — Borrower Calvin O. Wilson, Jr. — Date

Ezekiel T Wilson E.T.W. 11-7-11 — Borrower Ezekiel T. Wilson — Date

Borrower — Date

Borrower — Date

   (b) Having been informed of this right, and having no preference, I asked for assistance from the lender and was referred to a list of acceptable attorneys. From that list I select

Not Applicable — Borrower — Date

Not Applicable — Borrower — Date

Not Applicable — Borrower — Date

Not Applicable — Borrower — Date

2. I (We) have been informed by the lender that I (we) have a right to select an insurance agent to furnish required Homeowner's Insurance in connection with this mortgage transaction.

   (a) I select State Farm

C O Wilson Jr 11-7-11 — Borrower Calvin O. Wilson, Jr. — Date

Ezekiel T Wilson E.T.W. 11-7-11 — Borrower Ezekiel T. Wilson — Date

Borrower — Date

Borrower — Date

   (b) Having been informed of this right, and having no preference, I asked for assistance from the lender and was referred to a list of qualified agents. From that list I select

Not Applicable — Borrower — Date

Not Applicable — Borrower — Date

Not Applicable — Borrower — Date

Not Applicable — Borrower — Date

9

10

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Barnwell
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015- CP-06-00070

RECEIVED
JUN 07 2016
SC Court of Appeals

Quicken Loans, Inc.,

PLAINTIFF(S)

Ezekiel T. Wilson a/k/a Ezekiel Leigh Wilson, et al.,

DEFENDANT(S)

| Submitted by: J. MARTIN HARVEY, Special Referee | Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant |
|---|---|

**DISPOSITION TYPE (CHECK ONE)**

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED FOR RECORD
2016 MAY 13 AM 10: 13
RHODA D. MCELVEEN
BARNWELL CLERK OF COURT
BARNWELL COUNTY, S.C.

**IT IS ORDERED AND ADJUDGED:** ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

**ORDER INFORMATION**

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

**INFORMATION FOR THE JUDGMENT INDEX**

**Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.**

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
|---|---|---|
| N/A | N/A | $N/A |
| | | $ |
| | | $ |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge — Judge Code — May 13 2016 Date

## For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

Brian M. Barnwell, Esquire
Nelson Mullins Riley & Scarborough
P. O. Box 11070
Columbia, SC 29211-1070

Daniel W. Williams, Esquire
Bedingfield & Williams, LLC
P. O. Box 616
Barnwell, SC 29812

C. Bradley Hutto, Esquire
P. O. Box 1084
Orangeburg, SC 29116

Steven W. Hamm, Esquire
P. O. Box 7788
Columiba, SC 29202

Charles Dibble
P. O Drawer 1240
Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

**Court Reporter:**

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Order Attached

**********

## FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE

**(Instructions for Information Only-Not to be filed with Form 4C)**

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.

2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

   The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).

4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.

5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.

6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.

7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.

8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.

10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.

11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.

12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.

13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.

14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.